PREME COURT, U. S.

JAN 21 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 877

TAMPA PHOSPHATE RAILROAD COMPANY,
Petitioner.

—vs—

SEABOARD COAST LINE RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONSE OF PETITIONER TO MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

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FREE PRESS PUB. CO., INC., TAMPA, FLORIDA

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The Memorandum for the United States and the Interstate Commerce Commission as Amici Curiae (Memorandum) deals largely with the discussion by the Court of Appeals of the procedures for review of a determination by the Interstate Commerce Commission (Commission) as to its own jurisdiction to proceed to determine whether to grant or deny a certificate under Section 1(18).[1] The petitioner has repeatedly

[1] All statutory and other references in this Response are the same as in the Petition.

sought to make clear, and makes this last effort to show, that the procedures for review of Commission orders are foreign to the issue presented by this Petition and the Petitioner has not sought and is not now seeking a review of any order of the Commission.

The issue presented to this Court is whether or not the power of the Florida courts, as courts of general jurisdiction, to determine whether the conditions essential to the exercise of their jurisdiction exist[2] is protected by Section 2283 against interference by the District Courts of the United States. The condition essential to the exercise by the state courts of their jurisdiction is that the commerce in which Tampa proposes to engage is intrastate in character. In this case the state courts have not been permitted even to make that *initial* determination, both by the Federal district court and by the Court of Appeals, but the Court of Appeals went beyond the District Court and held that even the single judge Federal district court could not make that initial determination of its own jurisdiction.

The basis of the decision of the Court of Appeals was that the making of that determination would constitute a *review* of an order of the Commission, and that orders of the Commission could only be *reviewed* by a three judge Federal district court convened under the Urgent Deficiences Act. This is a semantical trap which would be ludicrous if it were not so serious. The three judge Federal court review upon the administrative record is exactly what it is called, a "review". It is not

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[2] This is the language used by this court in *Texas & P. R. Co. v. Gulf, C. & S. R. Co.*, 270 U.S. 266, 274, 46 S. Ct. 263, 70 L. Ed. 578, 582.

the making of a judicial determination but is only the review of an administrative determination already made with which the reviewing court is not empowered to disagree if there is *any* evidence to support the administrative finding.

The Commission is an administrative agency, not a court, and it has been uniformly recognized for many years that its finding of its own jurisdiction was not conclusive upon any court, state or federal, in any proceeding in which the issue of the Commission's jurisdiction was properly presented or necessarily arose (*Texas & Pacific,* supra Note 2). The Federal courts may surrender their Federal judicial power to the administrative agency, if they wish[3] but the Federal courts have no like power to surrender the state judicial power to the administrative agency and all the discussion of the procedures available to review orders of the Commission is wholly irrelevant to the issue presented to this Court by this petition for certiorari.

It is not now known whether the judicial determination of the state courts if and when permitted to be made will agree or disagree with the administrative findings of the Commission, for the simple reason that the state courts have not been permitted to adjudicate, and the Court of Appeals has held in this case that *no court,* state or Federal may now *adjudicate* the matter, and that only the one special Federal court may even exercise the limited *review* of the administrative finding by the agency of its own jurisdiction.

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[3] As the Fifth Circuit and the Fourth Circuit have done in the *Southern Railway* cases, *United States v. Southern Railway Co.*, 364 F.2d 86 (CA 5th, 1966), and *United States v. Southern Railway Co.*, 380 F.2d 49 (CA 4th, 1967), see Note 3 to the Petition (p. 7), and the reference to those cases in the opinion of the Court of Appeals (A. 25-28).

The Memorandum and the opinion of the Court of Appeals appear to be instinct with the fear that the state court (and the one judge Federal court, for that matter) will, if permitted to proceed, adjudicate that the commerce is intrastate in character and thereby bring to naught the administrative labor of the Commision, and that even the *possibility* of that result presents a case of judicial usurpation of power by the *nisi prius* courts of general jurisidiction.

Petitioner respectfuly submits that the contrary is the case, that the opinion of the Court of Appeals on the one hand arrogates to the Federal administrative agency a judicial power that it does not possess, and on the other hand takes away from the state courts judicial power that antedates the Federal constitution and has been recognized and protected by the present Section 2283 and its predecessors continuously since 1789, and that the method of review of orders of the Interstate Commerce Commission does not control the fundamental issue which is only and solely the extent of the protection afforded the state courts by Section 2283.

Dated at Tampa, Florida
January 20, 1970

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO CERTIFY that on this 20th day of January, 1970, one copy of the foregoing Response was furnished by mail to William A. Gillen, Esq., and one copy also by mail to James E. Thompson, Esq., both of Messrs. Fowler, White, Collins, Gillen, Humkey and Trenam, First Federal Building, Tampa, Florida, attorneys for respondent Seaboard Coast Line Railroad Company, and that one copy of the same was furnished by air mail with postage prepaid to Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C., and in like manner one copy each was furnished to Richard W. McLaren, Asistant Attorney General, and Howard E. Shapiro and W. Richard Haddad, Attorneys, Department of Justice, Washington, D. C. and in like manner one copy each to Robert W. Ginnane, General Counsel, and Jerome Nelson, Attorney, Interstate Commerce Commission, Washington, D. C., and that copy has also been furnished by air mail with postage prepaid to the Clerk of the United States Court of Appeals for the Fifth Circuit, 400 Royal Street, New Orleans, Louisiana.

s/James B. McDononugh, Jr.